Pride Mould (M) Sdn Bhd v Jemco Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–102 OF 1996
SHAIK DAUD, MOKHTAR SIDIN AND MOHD SAARI JJCA
9 MAY 2001

Civil Procedure *— Res judicata — Interlocutory order — Consent order struck out by court — No appeal against order — Whether res judicata applied*

The appellant and the respondent entered into an agreement whereby the appellant agreed to manufacture and deliver to the respondent 13,000 units GRP telephone booths ('the goods'). The appellant filed an action against the respondent for alleged breach of contract which resulted in entering of a consent order on 13 November 1992. Subsequently the appellant filed an action against the respondent for alleged breach of contract and the consent order. The respondent applied to strike out the suit which was allowed by the court to which there was no appeal. Then the appellant filed the present action for alleged breach of contract and consent order. The main complaint of the appellant was that the respondent had entered into a contract with a third party for the purchase of the goods. The respondent argued that the contract with the third party was an independent contract and so long as the respondent honoured the contract with the appellant, there was nothing to prevent the respondent from obtaining the goods from a third party.

Held, dismissing the appeal:

The appeal was against an interlocutory order and thus the principle of res judicata had no application. However, on the facts and circumstances of the case, there was no triable issue. Further, the case was frivolous, vexatious and an abuse of the process of the court (see p 68E–F).

[**Bahasa Malaysia summary**

Perayu dan responden telah memasuki satu perjanjian di mana perayu telah bersetuju untuk membuat dan menghantar kepada responden 13,000 unit GRP pondok telefon ('barangan tersebut'). Perayu telah memfailkan satu tindakan terhadap responden kerana dakwaan melanggar kontrak yang telah menyebabkan satu perintah persetujuan dimasukkan pada 13 November 1992. Berikutan itu perayu telah memfailkan satu tindakan terhadap responden kerana dakwaan melanggar kontrak dan perintah persetujuan tersebut. Responden telah memohon untuk membatalkan guaman yang telah dibenarkan oleh mahkamah. Tiada rayuan dibuat. Selepas itu perayu telah memfailkan tindakan sekarang ini untuk dakwaan melanggar kontrak dan perintah persetujuan. Aduan utama perayu adalah bahawa responden telah memasuki satu kontrak dengan satu pihak ketiga

untuk membeli barangan tersebut. Responden berhujah bahawa kontrak dengan pihak ketiga adalah kontrak yang berasingan dan selagi responden menepati kontrak dengan perayu, tiada apa yang menghalang responden daripada memdapatkan barangan tersebut daripada pihak ketiga.

Diputuskan, menolak rayuan tersebut:

Rayuan adalah terhadap perintah interlokutori dan oleh itu prinsip res jucidata tidak terpakai. Namun begitu, berdasarkan fakta-fakta dan keadaan-keadaan kes, tidak terdapat persoalan yang dipertikaikan. Tambahan pula, kes ini adalah remeh, menyusahkan dan satu penyalahgunaan proses mahkamah (lihat ms 68E–F).]

[Editorial Note: The appellant had filed for leave to appeal to the Federal Court on 19 October 2000]

Notes

For cases on res judicata generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3959–4032.

Cases referred to

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd [1988] 3 MLJ 90 (refd)

Peninsular Land Development Sdn Bhd v K Ahmad (No 2) [1970] 1 MLJ 253 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(b), (d)

Appeal from: Civil Suit No S1–22–486 of 1994 (High Court, Kuala Lumpur)

RR Mahendran (*RR Mahendran & Co*) for the appellant.
Azhar Arman Ali (*Yahya Helmy & Co*) for the respondent.

Mohd Saari JCA (delivering judgment of the court):**.** In the High Court, the respondent/defendant applied to strike out the action filed by the appellant/plaintiff under O 18 r 19(1)(b) and (d) of Rules of the High Court 1980 ('the RHC'). The learned registrar granted the application and in consequence thereof the appellant appealed to the judge in chambers. The learned judge dismissed the appeal, hence the present appeal to this court.

Events lending to the dispute

Under an agreement dated 15 April 1992 ('the agreement'), entered into between the appellant and the respondent, the appellant agreed, inter alia, to manufacture and deliver to the respondent 13,000 units GRP telephone

booths ('the goods') for a total sum of Ringgit Malaysia seven million one hundred and forty thousand (RM7,140,000). Out of 13,000 units, the appellant undertook to produce 300 units of the goods in the first month, 900 units in the second month and 1,000 units monthly thereafter in accordance with the expected order schedule of Telekom.

In a later development, the appellant filed an action against the respondent for alleged breach of contract vide Civil Suit No D3–22–1443–1992, which resulted in entering of a consent order on 13 November 1992.

The terms of the consent order are as follows:

> 1 Pihak-pihak akan meneruskan perjanjian bertarikh 15 April 1992, tetapi jadual hantar serahan adalah seperti berikut:
>
> (a) 1,100 unit pondok-pondok talipon GRP pada atau sebelum 31 Disember l992 dan kemudiannya;
>
> (b) 1,000 unit pondok-pondok talipon GRP pada atau sebelum tarikh akhir setiap bulan yang kemudian hingga 31 Januari 1994.
>
> 2 Defendan akan membekalkan plaintif dengan satu surat kredit dengan serta merta berkaitan dengan 1,100 unit pondok-pondok talipon GRP tersebut. Surat kredit tersebut harus membenarkan hantar serahan sebahagian dan menunaikan sebahagian berkenaan. Surat-surat kredit untuk bulan-bulan kemudian akan dibekalkan pada atau sebelum lhb setiap bulan.
>
> 3 Semua terma-terma perjanjian lain bertarikh 15 April 1992 akan terus beroperasi.
>
> 4 Defendan akan membayar plaintif RM11,765.89 pada atau sebelum 17 November 1992 seperti yang dinyatakan dalam surat peguamcara defendan bertarikh 12 November 1992 dan amaun-amaun selanjutnya yang dinyatakan di sana berkenaan dengan cagaran elektrik, bil elektrik, talipon dan air, sekiranya plaintif boleh menunjukkan bahawa bil-bil servis tersebut (dan cagaran) telahpun dibayar dan dijelaskan.
>
> DAN SELANJUTNYA ADALAH DIPERINTAHKAN bahawa kandungan 4 ditarik balik dengan tiada perintah dan setiap pihak menanggung kosnya sendiri berkenaan dengan kandungan mahkamah (4) dan tindakan ini juga ditarik balik dengan kebebasan kepada plaintif untuk memfail semula.

Subsequently, on 11 November 1993 the appellant filed an action against the respondent for alleged breach of contract and the consent order vide Civil Suit No D2–22–1137–1993. In the aforesaid suit, the appellant sought relief for specific performance, alternatively for damages. On application by the respondent for striking out of the suit, Siti Norma J (as she then was) granted the application to which there was no appeal.

Then, on 30 September 1994, the appellant filed the present action for alleged breach of contract and consent order and prayed for loss of profit and damages.

Finding

It is not in dispute that pursuant to the consent order dated 13 November 1992, the respondent had given the appellant letters of credit in connection

with the manufacturing of 1,100 units of the goods. Looking at para 19(i) of the statement of claim, it is not in dispute that the appellant had failed to manufacture and deliver to the respondent 1,100 units of the goods on or before 31 December 1992, as required under the terms of the consent order. The appellant was only able to deliver 481 units out of 1,100 units.

The main complaint of the appellant was that the respondent had entered into a contract with a third party (Tetuan Aya Fuji Fibreglass Industries Sdn Bhd) for the purchase of the goods and further the respondent had stopped its agent or servant from inspecting and issuing certificates in respect of the goods manufactured by the appellant.

With regard to the contract with the third party, counsel for the respondent argued that such a contract was independent of the contract with the appellant. So long as the respondent honoured the contract with the appellant, there was nothing to prevent the respondent from obtaining the goods from a third party to enable the respondent to meet its obligation under a contract with Telekom for the supply of the goods.

In the court below, in his judgment Mohd Noor J (as he then was) held, inter alia, the following:

> (1) kausa tindakan adalah sama, iaitu keingkaran kontrak, walaupun permohonan-permohonan adalah berlainan;
>
> (2) isu-isu baru yang dibawa oleh plaintif dalam tindakan ketiga termasuk timbul sebelum tindakan kedua difailkan, yang sepatutnya dimasuk dan dibicarakan dalam tindakan kedua itu.

We agree with counsel for the appellant that as the present appeal is against an interlocutory order, the principle of res judicata has no application (see *Peninsular Land Development Sdn Bhd v K Ahmad (No 2)* [1970] 1 MLJ 253; *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd* [1988] 3 MLJ 90). All the same, on the facts and circumstances of the present case, we are of the view that there is no triable issue. Further, we are of the view that the present case is frivolous, vexatious and an abuse of the process of the court as envisaged under O 18 r 19(1)(b) and (d) of the RHC. In the premise, we dismissed the appeal with costs.

Appeal dismissed.

Reported by Jafisah Jaafar